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In Re: Alternate Energy-Related Uses on the Outer Continental Shelf
Project No. REG-HQ-0024 (RIN 1010-AD30)

Introduction

Kirkpatrick & Lockhart Nicholson Graham LLP ("K&LNG") is pleased to submit these comments on behalf of our clients, to the Department of Interior, Minerals Management Service, in its OCS Alternate Energy Advanced Notice of Proposed Rulemaking (70 FR 77345, 12/30/05).

We appreciate the opportunity to provide this input, and remain ready to work with the Minerals Management Service to make the responsible development of offshore renewable energy projects a reality.

Our comments generally track the questions posed by MMS in the ANPR. However, there are some more general comments that are included. In addition, in some instances we do not address specific questions, but hope that as this program progresses, additional opportunities for input will become available.

Program Areas

1. Are there regulatory regimes, either in the U.S. or abroad, that address similar or related issues that should be reviewed or considered as MMS moves forward with the rulemaking process?

It is always educational to consider other regulatory regimes both here and abroad to ensure that the new program can take advantage of relevant benefits from other successful programs, and can avoid pitfalls that those other programs may have experienced. When evaluating the relevance of other programs, the MMS should first consider what it means by "similar" or "related" programs. Comparing a program that governs the "development of energy resources" may be no more appropriate than would be comparing a potato chip to a pineapple. The fact that they are both foods provides very little basis for concluding that concerns applicable to one are equally applicable to the other. In considering other "similar" or "related" programs, the long and arduous process that led up to enactment of these provision of the National Energy Policy Act must be kept in mind. We believe it is worthwhile to describe that history briefly.

The President's National Energy Policy ("NEP") laid out a comprehensive, long-term energy strategy for securing America's energy future. It recognized that to reduce our rising

dependence on foreign energy supplies, we must increase domestic production while pursuing energy conservation and the use of alternative and renewable energy sources. One of its core principles is to "advance new, environmentally friendly technologies to increase energy supplies and encourage cleaner, more efficient energy use." In that regard, the NEP recognized that renewable energy sources are a growing resource limited only by economics and technology, and thus directed the Secretary of Energy to research these opportunities. The NEP also recognized the need to have a clearly defined and efficient regulatory process for evaluating and approving these projects. Relatedly, the DOE National Renewable Energy Laboratory reported that ***although technology and economics have advanced considerably, regulatory barriers remain significant.***

Consistent with the NEP, in May of 2001, the President issued Executive Order 13212, stating that "it is the policy of this Administration that executive agencies take appropriate action consistent with applicable law to expedite projects that will increase the production, transmission and conservation of energy. The White House Task Force on Energy Project Streamlining was established to carry out this Executive Order under the auspices of the Council on Environmental Quality. The NEP also recommended that the President direct the Secretaries of Commerce and Interior to re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).

In 2001, the Ocean Policy Act of 2000 went into effect. It is intended to promote, among other things, "investments and technologies designed to promote national energy…" and ***coordination among government agencies and the private sector*** to ensure consistent and coherent regulation. Under the Act the U.S. Commission on Ocean Policy was established. In September of 2004 (and $8.5 million dollars and over 500 pages later) "An Ocean Blueprint for The 21st Century" ("Blueprint") was issued.

An entire chapter of the Blueprint is devoted to managing offshore energy resources. The Blueprint specifically addressed the importance of harnessing ocean currents to produce renewable and non-polluting energy that will assist in reducing our dependence on foreign sources of energy, consistent with the NEP. ***However, the Blueprint noted that this effort may well be hamstrung by the lack of clear and coherent regulatory authority over these kinds of projects. The Report specifically recommended congressional action to address this problem, including the creation of a streamlined permitting process for renewable energy facilities.***

In June 2002, while the Commission was developing its report, the Administration (consistent with the NEP) proposed legislation authorizing the Department of Interior to be the lead agency and develop an appropriate regulatory framework and permitting process for non-traditional energy projects. On April 19, 2005, MMS Director Burton endorsed its passage in testimony before Congress, in order to encourage and accelerate the significant potential for renewable energy from the ocean.

The Administration quickly responded to the "Blueprint" with its "Ocean Action Plan" in December of 2004. The Committee on Ocean Policy under the auspices of the CEQ was established to implement the core recommendations contained in the Report. Recalling the 2002 proposed legislation, the ***Action Plan notes the value to the public of the oceans as an energy resource and that this valued resource would benefit substantially from better integration of regulatory activities.***

Section 388 of the Energy Policy Act is the culmination of this process. The primary purpose of the Energy Policy Act is to foster the growth of new and existing energy supplies for the United States. The primary purpose of whatever regulatory program is adopted must be consistent with this goal. The MMS was specifically made the lead agency so that any regulatory overlap, ambiguities, or other issues could be addressed.

To be consistent with these principles, any program that is considered "similar" or addressing "related" issues must share the primary goal of developing offshore renewable energy and using a streamlined regulatory process. Thus, while mineral leasing programs are informative, their goal is not primarily the development of power, but the development of power from finite and exhaustible resources from which the public should benefit in the form of revenues. Similarly, the purpose of the Federal Power Act is not just to develop power, but to establish a comprehensive program regulating it.

In contrast, in a variety of European and Asian countries, programs to encourage the development of renewable energy technologies not only create regimes for private development of these technologies, but also provide concrete support to developing technologies, as well as financial support and fast-tracking of research, in order to affirmatively encourage the development of these technologies and reap the benefit of renewable energy as soon as possible. While the MMS is not in the position of providing these financial incentives, it can develop a regulatory program that is designed to create opportunities for these technologies to develop, rather than create unnecessary regulatory barriers to the growth of this market.

The four program areas listed in the ANPR focus on traditional regulatory concerns: (a) regulatory permissions for access to offshore areas; (b) "command and control environmental regulations; (c) regulation of operations; and (d) payments and revenues to the government. It is important that these program areas include provisions that encourage the development of this technology and do not just regulate it. We hope that as MMS proceeds, it will keep this in mind.

Program Area: Access to OCS Lands and Resources

General issues

Please provide information on how MMS can best:

A. Provide access for resource and site assessment.

These technologies are in their beginning stages and require extensive and potentially long- term funding, often from third parties in the private sector. Consideration should be given to distinguishing between access for commercial operations, and access for research, demonstration and pilot projects. In that regard, a simple registration process should be developed for these initial stages, rather than a full fledged permitting & fee program, since the latter is generally appropriate for projects that are going to succeed, not for those that are experimental. This is not unlike the challenges faced by the biotechnology industry a number of years ago.

In this regard, initial access for research, demonstration, and pilot projects should involve minimal if any 'access fees' as long as no permanent damage is done to the environment or existing facilities. Copies of these notices should be given to others who have also registered for research in the same geographic area.

B. Issue the appropriate instrument (e.g., leases, easements, rights-of-way).

For experimental technology, MMS should provide an appropriate instrument to permit initial activities up to and including research, demonstration and pilot projects, even at a commercial level. The instrument may be different depending on the technology. For the initial research and development phase the type of instrument is not as important as its cost. Instruments should be provided for a length of time sufficient to allow for site investigation, project research and development, and full-scale development through cost recovery. Because these initial instruments are likely to be for short term periods, and will not generate a profit, emphasis must be placed on ease of obtaining them.

C. Solicit interest for development projects.

America lags in the development of renewable energy technology, in part because of the historical lack of a clear and coherent policy to encourage/allow for its development. Since one of the goals of the Energy Policy Act of 2005 is energy independence, MMS should consider giving some preference to domestically based/owned/and/or controlled entities.

In addition, the cost of responding to a solicitation of interest also should not be so expensive, complicated, and lengthy that only those with extensive resources are able to participate.

D. Identify terms and conditions of use such as:

Duration. The minimum duration for projects using experimental technology should be that needed for site assessment, R&D, project development and cost recovery.

Assignment of rights. The program should provide great flexibility for assignment of rights, as long as such assignment does not create additional material risk factors for the public.

Suspensions and cancellation of rights. Because these projects require significant upfront investment, any suspension or cancellation must be sensitive to the property interests of owners of the rights. In addition, the investor community must be kept in mind as such investments may be necessary for smaller developers to participate.

Suspension or cancellation should be limited to circumstances where the owner of the rights is clearly unable to complete his stated plans or has engaged in significant misconduct (e.g. felony conviction) relating to the project that justifies suspension or cancellation.

Limitation of rights. Any limitations placed on rights must give due regard to the nature of the rights as well as the interest of the investment community.

E. Identify geographical areas of interest for:

Resource and site assessment. MMS' first duty under this program is to encourage and foster the production of energy, leading to energy independence for the United States. Because these are new technologies, the potential developers should be given the widest possible latitude to identify those potential resources and sites, and there should be few if any "upfront" regulatory limits placed on potential sources and sites.

Development feasibility. Since an energy project design may be iterative, and project economics can be affected by short-term individual or collective events, conclusions regarding the feasibility of a development on paper may not accurately reflect the ultimate project outcome.

F. Ensure fair competition.

It is unclear what is meant by this term. Is it referring to competition among competing renewable technologies, or competition between those technologies and existing uses? While there may be some measure of competition among projects, MMS's first concern should be <u>cooperation</u> among OCS-based interests – whether between competing projects, or between a proposed energy project and a so-called "existing use."

G. Process permits and applications.

This consideration poses the greatest threat to the development of offshore renewable energy through the "paralysis of analysis" that can be created (albeit unintentionally) by multiple levels of agency review. As noted above, before Section 388 was enacted, the biggest obstacle to development of these resources was overlapping and unclear agency jurisdiction. This is a major reason MMS was designated as the "lead" agency under this program. Because there are federal, state, and even local interests implicated, there should be "one stop shopping" - one lead agency at each level that has plenary authority to resolve any issues among others at its level. The regulatory program should be structured to encourage state and local interests to do the same.

H. Process pre-application resource assessments.

This concept seems to be drawn from other programs where existing technologies and markets already exist. It is crucial that if there are any pre-application assessments, there also be strict timelines and limits on what information can be collected and over what period of time. By definition, some of the issues associated with this program are not and will not be fully known or quantifiable until the projects are in place. Pre-application resource assessments must consider and recognize that this uncertainty will always exist to some extent. When pre-application assessments are performed, the permit issuing agency (noted in "G", above) should then accept the assessment research and results, and avoid imposing duplicative or additional demands on project applicants, unless the assessment clearly shows that there will be significant damage that will result from the project. If the permit-issuing agency requires further research, it is free to do so independent of the permitting process, but every effort should be made to avoid delaying the permitting process.

I. Allow concurrent developments.[1]

Unless they are completely mutually exclusive, MMS should allow concurrent developments of energy-producing technologies in the OCS, as long as the project sponsors understand and are aware of this before they begin their efforts. There is no reason to wait for sequential testing of technologies until the "best"one is identified. MMS should keep alert to the development of the most productive or successful technologies, in order to maximize the return of the OCS projects to the nation as soon as possible.

Specific Questions

2. Possible development scenarios include phased access rights, which would allow for resource and/or site assessments and research prior to securing additional access rights. Rights could be permitted on a case-by-case basis. Development rights would be secured by a competitive process. An alternative would be to require that interested parties secure the access rights to an area prior to conducting assessments and research. Please comment on these possible options.

"Phased Rights" present an attractive option. However, MMS should be mindful that, without government or substantial corporate backing, "Phased Rights" might preclude the ability of small project developers from testing a successful new technology. If a project is worthy of MMS' support, that support must be clear and unambiguous. Having parties secure such rights – or at least preferential rights - on the basis of a reasonable presentation (and if available, demonstration of technology) is appropriate. It should be apparent reasonably quickly – in less time than it takes to explore and exploit an oil lease, for example – whether an alternative energy-producing technology is going to work.

1 We presume this refers to two or more developers occupying an area simultaneously.

The "competitive process" for development rights of which MMS speaks makes sense for existing industries and ongoing businesses, but may not be entirely applicable to new technologies. It works if the rate of return of the project is certain, as it largely is for oil and gas developments. When a new project or technology is developing, however, its rate of return is generally less clear. The market is not created by the competitive bid process. Rather, that process is introduced where there is a market that will sustain it. MMS needs to use a system that creates opportunity for technological success first, and once demonstrably profitable, when capital costs are paid and energy is being reliably produced, MMS can then consider how the more standard competitive bid process might work.

3. In cases where applicants or interested parties propose activities that would foreclose competing future uses, how should MMS estimate "a fair return," especially if the competing uses would likely be public uses?

We think it is somewhat premature to consider this question. As discussed below, "fair return" is a reflection of how the government should be compensated for that which it risks and/or is giving up. It should not necessarily be based on what the government thinks an entity's profit margin might be. The determination of fair return for these projects – particularly those that do not yet have a track record – should be deferred, as part of the government's encouragement to entrepreneurs and researchers who are willing to undertake the risks of alternative energy development. For such non-extractive technologies, the fair course of action is for the government to wait until the technology is demonstrated, and through its period of cost recovery. This will foster development of successful technologies.

4. What constitutes a geographical area of interest?

An "area of interest" must be flexible enough to consider the configuration of the project and the type of technology employed.

5. What assessments should we require prior to competition?

We assume the term "assessment" refers to "environmental" and similar evaluations (such as those conducted under the National Environmental Policy Act.) There is a significant potential that these assessments could undermine a new program such as this one, for at least two reasons. First, virtually every program that is subject to NEPA type analyses suffers extensive delays due to 'unknown' variables. That is the nature of the NEPA process. Second, and more importantly, because these are new technologies, it is virtually impossible to predict with the certainty what the potential environmental impacts will be, especially when compared to the more concrete evaluations possible with known technologies.

We suggest, therefore, that any major NEPA-type assessments be conducted at the permit evaluation stage, and not before, at least for the first several years of the program. The approach taken by the agencies that sit on the OCS Policy subcommittee on how to regulate Alternate Energy projects seems to support this view.

It is our understanding that the vast majority of entities (either foreign or domestic) that have shown an interest in investing time and effort to develop OCS energy projects are not within the Fortune 100. Because they may lack the resources to navigate the regulatory process, especially a 'new' process, we suggest that an ombudsman-type office be created within the MMS Director's office. Its role would be to monitor MMS actions proposed under Section 388 from the point of view of the small developer.

6. How should MMS structure the competitive process and the application process used to issue OCS access rights? Should MMS auction access rights or engage in direct negotiation?

Structuring an entire bureaucracy for a business that does not yet exist may prevent it from existing at all. As noted above, for the initial stages of research, development, and pilot projects, the process must be very streamlined.

7. Should MMS take a broad approach to developing a program, or should efforts be targeted to specific regions?

MMS will not only be faced with many new challenges, it will may be faced with issues it has never faced before. The MMS should therefore develop an approach that deals with the majority of those new issues uniformly before creating a system of regions – and regional permitting groups – that could apply program requirements inconsistently.

8. How should MMS consider other existing uses when identifying areas for access?

MMS should start by evaluating how the developer proposes to interact with existing uses, as part of the development. The Service should also consider how "real" the claimed existing uses might be. (e.g., Is someone trying to protect a historical activity that has not been active for decades ?)

The possibility of generating energy in the OCS is specifically endorsed by the Energy Policy Act of 2005, like fishing is endorsed by the Magnuson-Stevens Fishery Conservation and Management Act. Both fisheries and energy utilities serve the public (utilities, in fact, serve a larger segment) – therefore, neither should displace the other.

At the same time, we think it important the MMS distinguishes between actual, existing uses and potential uses that may or may not be based on applicable law. For example, the FERC has purported to issue 'permits' relating to renewable energy projects more than three nautical miles offshore[2], even though it lacks jurisdiction to do so. As explained below, such so-called permits are legal nullities and should not be considered by MMS since the issuing agency had no authority to issue them.

FERC licensing jurisdiction has never extended beyond the traditional three-mile "navigable waters" boundary, and nothing in the Act authorizes FERC to reach beyond that limit now. To the contrary, it is well-established in a broad variety of contexts that federal agency jurisdiction does not extend more than three nautical miles from shore. In the 80-plus year history of FERC and its predecessor agency prior to 2003, FERC never sought to extend its in-land licensing authority beyond the traditional boundary limiting federal agencies' jurisdiction to

2 See AquaEnergy Group, Ltd., 101 FERC ¶ 62,009 (2002) reh'g denied, 102 FERC ¶ 61,242 (2003); accord Red Circle Systems Corporation, 110 FERC ¶ 62,272 (2005); accord Red Circle Systems Corporation, 110 FERC ¶ 62,271 (2005), In two of these cases the FERC Orders did not actually grant authority to *anyone* to do *anything.* See Red Circle Systems Corporation, 110 FERC ¶ 62,272 (2005); accord Red Circle Systems Corporation, 110 FERC ¶ 62,271 (2005) (granting Red Circle Systems Corporation a "preliminary permit," which merely acts as a placeholder for the time when an actual permit may be issued).

three nautical miles from shore.[3] In this regard, FERC's approach appears to be inconsistent with well-settled Supreme Court precedent that narrowly construes FERC's licensing authority as having a "limited scope and purpose." [4]

In 1988, President Reagan issued a proclamation (the "Proclamation") expanding the U.S. "territorial sea . . . to the limits permitted by international law."[5] The effect of the Proclamation, by its own terms, is limited to "territorial seas" (a term of art under international law). It expressly does not alter existing domestic legal definitions. Numerous federal statutes,[6] and the regulations promulgated by the Army Corps of Engineers ("ACE") recognize the traditional three nautical mile limit. For example, the ACE's definition of "navigable waters" appearing at 33 CFR §329.12(a) states: "The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas)." In other words, the ACE's definition of "navigable waters," was unchanged by the Proclamation, and confirms that federal law continues to recognize the traditional three mile limit. Notwithstanding this, FERC has relied on that part of the 1988 Presidential Proclamation extending U.S. "territorial seas" to twelve miles, while ignoring the President's express statement (stated in the very same Proclamation) **not** to alter "existing Federal or State law or any jurisdiction… derived therefrom."[7]

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3 FERC only asserted jurisdiction up to 12 miles from U.S. shores after receiving a request that FERC confirm its lack of jurisdiction regarding a proposed ocean energy project located beyond the three mile limit. See AquaEnergy Group, Ltd., 101 FERC ¶ 62,009 (200) reh'g denied 102 FERC ¶ 61,242 (2003).

4 Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 403 (1975).

5 Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

6 See Herb's Welding, Inc. v. Gray, 470 U.S. 414, 419 (1985) (noting the relevancy of the three mile limit of navigable waters upon claims made under the Longshore and Harbor Workers' Compensation Act). See also 33 U.S.C. §1362 (defining "navigable waters" as "the waters of the United States, including the territorial seas," and defining "territorial seas" as extending three miles from "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters…."); The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (stating in §1301(b) that "in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean…"; Outer Continental Shelf ("OCS") Act, 43 U.S.C. §1331 (incorporating the three mile limit set forth in 43 U.S.C. §1301 of the Submerged Lands Act).

7 Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). AquaEnergy Group, Ltd., 101 FERC ¶ 62,009 (2002) reh'g denied, 102 FERC ¶ 61,242 (2003) (citing to Presidential Proclamation No. 5928 to support its statement that "While at one time the United States asserted jurisdiction over waters up to three nautical miles offshore, since 1988 it has asserted jurisdiction up to 12 nautical miles.").

9. How should MMS balance existing uses within an area with potential wind and current energy projects?

The President and Congress have repeatedly insisted that the United States develop a measure of energy independence. Such projects affect a plethora of issues, from security to trade deficits, and from the economy to environmental justice and global warming. All of these wide-ranging impacts should be taken into account vis a vis existing uses, including tourism, sport fishing and energy production. The successful development of these projects should be a priority for MMS.

10. Should MMS require permits for collecting data from vessels? Should we consider this information proprietary? What criteria should we use for holding the information proprietary?

As long as the prospective data collection program is non-destructive (i.e., it does not involve actions that will clearly cause significant adverse impacts on the environment, such as the use of explosives or pressure equipment to penetrate undersea geology), MMS should require only that a developer file his plans for data collection with the Service for informational purposes.

Whether the data collected are proprietary should depend upon their nature. For example, a company proposing to develop geothermal energy researches the presence of undersea vents that are proprietary to their process, it should be able to keep that information confidential (similar to the developer of an oil tract).

11. What criteria (e.g. environmental considerations, energy needs, economics) should MMS consider in deciding whether or not to approve a project? What criteria should MMS consider for different competing projects (i.e. wind versus current) for the same site?

It is not possible to provide specific criteria in the abstract. However, as noted above, the primary criterion must be whether the project will provide a commercially viable source of renewable energy. Economic considerations are better left to the developer. Environmental considerations must be taken into account as well but absent some overwhelming and almost certain adverse impact to the environment, such considerations should not be the deciding factor.

MMS should endeavor to avoid creating unnecessary choices between different renewable technologies by constraining its view of the 'same site.' Every effort should be made to encourage development of these resources through shared sites, or through incentives to use alternative sites where feasible and appropriate.

Program Area: Environmental Information, Management, and Compliance

General issues

Please provide information regarding:

K. Information requirements needed for environmental management systems for any project.

It is premature to consider this issue at this stage, since neither the technology nor projects are even known. At the appropriate time, consideration should be given to following ISO 14001-type principles.

L. Assessments and studies of risks and impacts (site-specific and cumulative) associated with offshore energy and alternate use projects.

Our comments above regarding the NEPA process apply here. MMS should be committed to assuring that the NEPA process remains a valuable method for assessing environmental impacts, and not a tool for delaying the entire process. It must also be remembered that the core reasons for this program are the environmental benefits that Congress determined should be supported.

M. Examples of best practices for environmental compliance, monitoring, and effectiveness being used in the U.S. and elsewhere.

MMS should take advantage of other governmental agencies around the world. For example, the Korean national Second Energy Plan (2002-2011) charges its Ministry of Maritime Affairs and Fisheries with the development of an ocean-current-powered facility planned to generate 90 megawatts, and tidal power facilities to generate another 700-plus MW. The Ministry has already committed 6.3 billion won (about $6.5 million) to build a test facility for an American technology in Korea.

N. Balancing environmental considerations with national energy needs.

Two fundamental principles must be kept in mind. First, from an operational standpoint, all these technologies are more environmentally benign than other types of energy production technologies. Second, these technologies will create an energy product that by definition is more environmentally benign than the alternatives, if for no other reason than it is renewable. Given these facts, plus the language of the Act focusing on encouraging the development of these projects, MMS must be careful when addressing these issues.

Specific Questions

12. What types and levels of environmental information should MMS require for a project?

Our comments above regarding the NEPA process are equally applicable here. The key answers to this question should involve (a) what are the real potential issues for the project, (b) what risks cannot be mitigated and thus must be avoided, and (c) how can investigations be structured so that at-sea research is performed only once? By focusing on concerns having a probability of actually existing (instead of remote "what-ifs"), the time of the government agencies and the resources of the project developers will be spent appropriately.

13. What types of site-specific studies should MMS require? When should these studies be conducted? Who should be responsible for conducting these studies?

We believe that it is too early for MMS to develop a regulation addressing this. It is far too dependent on the nature of the project. We do not think that MMS should create a structure that presumes certain kinds of studies are necessary and that places the burden on the applicant to establish that such studies are not necessary.

14. What should be the goals and objectives of monitoring, mitigation, and enforcement?

We believe this question is premised on other programs that are not analogous to this one. The primary goal of this program is to encourage the development of this technology. The OCS is a new environment for virtually every developer, and even MMS will see issues arise that it has not previously experienced in oil and gas and production activities. MMS and project owners must collectively learn the best way to live and work in this new environment. MMS should ensure that the activities it requires of project owners and developers address those "real" issues identified as part of the answer to Question 12.

15. What types of impacts are of concern? What are effective approaches for mitigating impacts? How can mitigation effectiveness and compliance with Federal environmental statutes be assessed?

It is not clear if this question assumes that mitigation is necessary because some adverse environmental impacts are certain to exist, or if it is assumes that a project permit can be used to impose mitigation obligations on the permittee unrelated to the project. If either assumption is applicable, we submit the following comment. Because this is a new program, it should not be used as a proxy for imposing "mitigation" obligations and costs that have nothing to do with the project. If the project is successful and MMS wants to and may use "royalty" or other payments made to the United States to address other environmental concerns, that is its decision.

By way of example, we understand that entities operating the undersea natural gas pipelines from the Bahamas to Florida are being forced to remove hundreds of thousands of tires

placed under the ocean several decades ago in an attempt to create an artificial reef, even though these tires apparently have nothing to do with the project. Mitigation should be not imposed on an innocent party, by an agency looking for an expedient solution to an unrelated problem. Particularly, where, the prospect of success is not certain.

16. What regulatory program elements lead to effective enforcement of environmental requirements?

This question may compromise the primary focus of MMS's responsibility under the Act – development of renewable energy from the OCS. We believe that a more appropriate question is "what can MMS and the project developer do to maximize the effectiveness of those resources needed to protect the environment in which the project resides?" This reformulated question leads to a cooperative solution, and makes MMS and the developer more of a team rather than relying on traditional "command-and-control" philosophy that seems to be the premise of this question.

17. How should environmental management systems be monitored (by the applicant, the MMS or by an independent third party)? What should be the MMS roles versus the roles of industry for ensuring appropriate oversight and governance?

See our reference to ISO 14001-type principles above.

Program Area: Operational Activities

<u>General issues</u>

Please provide information on:

O. Permitting pilot projects.

As noted above, we believe that research, demonstration, and pilot projects should not be subject to a formal permitting process, but rather should be able to proceed very quickly. If the program is intended to encourage new technologies by a diverse community of interests, some of which require third party investments, it is crucial that these preliminary steps be streamlined, inexpensive, and clear.

Q. Protecting environmental resources during construction, production, and removal.

Several considerations should be addressed. First, developers of these projects should be subject to no greater burden than those of other projects. Second, the regulatory program should not assume that the nature of construction, operation, and removal will be comparable to what is

faced with, for example, offshore oil facilities. Finally, the evaluation of the nature of environmental protection must be based on real risks of harm, rather than speculative, theoretical ones.

Program Area: Payments and Revenues

General issues

As stated at the outset, the primary focus of this Section 388 is to encourage the development and use of these renewable technologies to produce energy. Once the market is developed, it is appropriate for consideration to be given to what 'fair rate' of return is based on what resources are being consumed, or are made available. No one knows which technologies will work or how efficient they will be. It is premature for MMS to consider what portion of, or how it should calculate the profit it should receive from developing industries.

At the research and development stage, MMS should only charge that which is necessary to recover the costs of its development and monitoring of the program. Thus, for example, those seeking to develop these technologies should be obligated to undertake and/or pay the cost of all necessary NEPA and other assessments.

Once a technology is proven and has been in place at a commercial stage for a reasonable period of time, MMS can then evaluate what a "fair return" to the United States should be. The following three principles should be applied to this analysis.

First, the "fair return" due the United States is a function of the cost of the resource that the United States gives up. That value should not change based on the profit margin of the company that developed and implemented the new renewable technology.

Second, the "fair return" should not be a function of its government's perceived need to replace dwindling receipts that might result from reduced use of nonrenewable resources.

Third, consideration should be given to the public investment into the technology. We note that many forms of alternative energy have received financial support from local, state and Federal government, in the form of tax credits, deferments or rebates. It is inequitable to extract the same payments from those who have received such support and financial benefits as from those that have risked their own capital.

Coordination and Consultation

18. While MMS considers this ANPR an appropriate start at consultation with interested and affected parties, what other efforts could be undertaken at this early stage of program development?

We strongly recommend that the MMS include individual developers as well as trade associations and the myriad agencies and other interests that will be part of the rulemaking process. The agency should carefully consider how other countries are addressing this, and consider whether the standard 'command and control' mechanisms that are inherent in the regulatory process are appropriate here.

In addition, as a general matter, consultation and communication are designed to maximize the exchange of information as well as provide for transparency in the process. The MMS should resolve itself not to let the consultation and communication process become a bar to the development of this new industry. This is particularly the case with inter- and intra-agency consultation. Those consultations are designed to inform the process, not stop it from moving forward.

Respectfully submitted,

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